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Kong Hoi Chieng v AK Land Sdn Bhd

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO S-02(W)-1030–06 OF 2019
LAU BEE LAN, RAVINTHRAN AND MOHD SOFIAN JJCA
4 OCTOBER 2021

C *Equity — Restitution — Unjust enrichment — Plaintiff filed action against second defendant premised on restitution for unjust enrichment — High Court dismissed plaintiff's action — Whether second defendant had been enriched — Whether plaintiff's action constituted duplicity of proceedings and/or abuse of process of court — Whether plaintiff pleaded claim for restitution for unjust enrichment in statement of claim — Whether plaintiff's claim was statute barred — Sabah Limitation Ordinance Schedule, item 97*

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Kong Hoi Cheng ('the plaintiff') had filed an action at the High Court against Kong Yu Yong ('the first defendant') premised on breach of memorandum of understanding ('the MOU') and against AK Land Sdn Bhd ('the second defendant') premised on restitution for unjust enrichment. In relation to the claim against the first defendant, the plaintiff, inter alia, argued that the first defendant had repudiated his obligation under the MOU and the plaintiff therefore sought an order for the re-transfer of shares in AKL Construction Sdn Bhd by the first defendant to the plaintiff. In respect of the claim against the second defendant, the plaintiff argued that the former was enriched by the shares in Sabalight Sdn Bhd and the shares in AKL Construction Sdn Bhd at the expense of the plaintiff because the second defendant was nominated by the first defendant to receive or to hold the shares in Sabalight Sdn Bhd and AKL Construction Sdn Bhd. At the commencement of the proceedings, the counsel for the second defendant informed the court that the first defendant being a bankrupt, had elected not to defend himself and that the trial was only between the plaintiff and the second defendant. At the end of the case, the learned High Court judge ('the HCJ') dismissed the plaintiff's action mainly on the following grounds: (a) that the plaintiff's action constituted duplicity of proceedings and/or tantamount to an abuse of process of court because the subject matter in the plaintiff's action was identical or substantially the same as that of the OS No K 24-03 of 2007 ('the OS'); (b) that the plaintiff had not pleaded a claim for restitution by reason of unjust enrichment in the statement of claim against the second defendant; and (c) that the plaintiff's claim against the second defendant was statute barred. Aggrieved by the decision, the plaintiff filed the present appeal.

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Held, allowing the appeal with no order as to costs and setting aside the order of the High Court:

(1) The court agreed with the plaintiff that the plaintiff's action and the OS may arise out of similar background facts, but the causes of action and the parties were different. The second defendant was not a party to the OS and no relief was sought in respect of the MOU in the OS, as such, it was not possible for the plaintiff to include his claim against the second defendant in the OS. Based on the facts, the court found that there was no duplicity of proceedings and no abuse of the process of court. The HCJ was plainly wrong in concluding that the present action and the OS was considered as duplicity of proceedings and/or tantamount to an abuse of process of court (see paras 40–41 & 43–44).

(2) It was trite that one needed to plead the material facts and not the law or the evidence. The plaintiff had pleaded that he had not received consideration for the shares due to the first defendant's repudiation of the MOU and that the shares were being held by the defendants. It was not disputed that the plaintiff had transferred the shares to the defendants pursuant to the MOU. Further, the defendants did not plead that it had paid for any of the shares in the second defendant and the defendants' own witness DW2 had admitted that the first defendant could not afford to pay for the shares. Since the shares were transferred to the defendants pursuant to the MOU and there was a total failure of consideration for the shares due to the first defendant's repudiation of the MOU, therefore the defendants had been enriched with the shares in the second defendant and Sabalight Sdn Bhd and the retention of the shares in the second defendant and Sabalight Sdn Bhd was therefore unjust. Based on the above finding, the court held that the pleadings were sufficient for claiming 'unjust enrichment' against the defendants in respect of the shares in the second defendant and Sabalight Sdn Bhd (see paras 45–49 & 53).

(3) A right to claim a restitution remedy founded on the law of unjust enrichment was not founded on contract law or a breach of contract but may be available where a contract had been validly terminated. The right to claim restitution based on unjust enrichment did not accrue even at the point in time when a contracting party had repudiated a contract. The plaintiff's cause of action against the defendants accrued when he knew about the caveats lodged by one Usin bin Jatin which constituted a breach of the MOU but the right to claim for restitution for unjust enrichment had not accrued yet as the MOU had not been terminated. Even as of 27 November 2006, when the first defendant stated that he did not recognise the MOU as binding, the MOU was still valid and subsisting, as such, no right to claim restitution had yet accrued. Therefore, the plaintiff's action which was filed on 26 November 2012,

was filed within the six years period provided by item 97 of the Schedule to the Sabah Limitation Ordinance and not statute barred (see paras 55–57, 60, 66 & 69).

[Bahasa Malaysia summary

Kong Hoi Cheng ('plaintif') telah memfailkan tindakan di Mahkamah Tinggi terhadap Kong Yu Yong ('defendan pertama') berdasarkan pelanggaran memorandum persefahaman ('MOU') dan terhadap AK Land Sdn Bhd ('defendan kedua') berdasarkan restitusi untuk pengayaan yang tidak adil. Berhubung dengan tuntutan terhadap defendan pertama, plaintif, antara lain, berhujah bahawa defendan pertama telah menolak kewajipannya di bawah MOU dan oleh itu plaintif memohon perintah untuk pemindahan semula saham dalam AKL Construction Sdn Bhd oleh yang defendan pertama kepada plaintif. Berkaitan dengan tuntutan terhadap defendan kedua, plaintif berhujah bahawa defendan kedua telah diperkayakan dengan saham dalam Sabalight Sdn Bhd dan saham dalam AKL Construction Sdn Bhd di atas perbelanjaan plaintif kerana defendan kedua telah dinamakan oleh defendan pertama untuk menerima atau memegang saham dalam Sabalight Sdn Bhd dan AKL Construction Sdn Bhd. Pada permulaan prosiding, peguam bagi defendan kedua memaklumkan kepada mahkamah bahawa defendan pertama yang merupakan seorang bankrap telah memilih untuk tidak membela diri dan perbicaraan ini hanya di antara plaintif dan defendan kedua. Pada akhir kes, hakim Mahkamah Tinggi yang bijaksana menolak tindakan plaintif terutamanya atas alasan berikut: (a) bahawa tindakan plaintif merupakan prosiding pendua dan/atau merupakan penyalahgunaan proses mahkamah kerana permasalahan dalam tindakan plaintif adalah sama atau sebahagian besarnya sama dengan Saman Pemula No K 24-03 Tahun 2007 ('SP'); (b) bahawa plaintif tidak memplid tuntutan untuk restitusi oleh sebab pengayaan yang tidak adil dalam pernyataan tuntutan terhadap defendan kedua; dan (c) bahawa tuntutan plaintif terhadap defendan kedua adalah terhalang oleh undang-undang had masa. Terkilan dengan keputusan tersebut, plaintif memfailkan rayuan ini.

Diputuskan, membenarkan rayuan tanpa perintah berkaitan kos dan mengenepikan perintah Mahkamah Tinggi:

(1) Mahkamah bersetuju dengan plaintif bahawa tindakan plaintif dan SP tersebut mungkin timbul daripada fakta latar belakang yang sama, tetapi kausa tindakan dan pihak-pihak adalah berbeza. Defendan kedua bukanlah pihak kepada SP tersebut dan tiada relif dimohon berkenaan dengan MOU tersebut di dalam SP, oleh itu, adalah tidak mungkin untuk plaintif memasukkan tuntutannya terhadap defendan kedua di dalam SP tersebut. Berdasarkan fakta-fakta, mahkamah mendapati bahawa tidak terdapat penduaan prosiding dan penyalahgunaan proses mahkamah. Hakim Mahkamah Tinggi jelas salah dalam membuat

kesimpulan bahawa tindakan semasa dan SP tersebut dianggap sebagai prosiding pendua dan/atau merupakan penyalahgunaan proses mahkamah (lihat perenggan 40–41 & 43–44).

(2) Sudah menjadi undang-undang yang mantap bahawa pihak dalam tindakan perlu memplid fakta-fakta yang penting dan bukannya undang-undang atau keterangan. Plaintif telah memplid bahawa dia tidak menerima balasan untuk saham tersebut disebabkan oleh penolakan defendan pertama terhadap MOU dan bahawa saham tersebut dipegang oleh defendan-defendan. Tidak dipertikaikan bahawa plaintif telah memindahkan saham kepada defendan-defendan menurut MOU. Selanjutnya, defendan-defendan tidak memplid bahawa ia telah membayar harga mana-mana saham dalam defendan kedua dan saksi defendan sendiri iaitu DW2 telah mengakui bahawa defendan pertama tidak mampu membayar harga saham tersebut. Oleh kerana saham telah dipindahkan kepada defendan-defendan menurut MOU dan terdapat kegagalan pertimbangan sepenuhnya untuk saham tersebut disebabkan oleh penolakan defendan pertama terhadap MOU, oleh itu, defendan telah diperkayakan dengan saham dalam defendan kedua dan Sabalight Sdn Bhd dan kesannya pengekalan saham dalam defendan kedua dan Sabalight Sdn Bhd adalah tidak adil. Berdasarkan dapatan di atas, mahkamah memutuskan bahawa pliding adalah mencukupi untuk menuntut 'pengayaan yang tidak adil' terhadap defendan-defendan berkenaan dengan saham dalam defendan kedua dan Sabalight Sdn Bhd (lihat perenggan 45–49 & 53).

(3) Hak untuk menuntut remedi pengembalian yang berasaskan undang-undang pengayaan yang tidak adil tidak diasaskan pada undang-undang kontrak atau pelanggaran kontrak tetapi boleh didapati apabila kontrak telah ditamatkan secara sah. Hak untuk menuntut pengembalian berdasarkan pengayaan yang tidak adil tidak terakru walaupun pada masa apabila pihak yang berkontrak telah menolak kontrak. Kausa tindakan plaintif terhadap defendan-defendan terakru apabila dia mengetahui tentang kaveat yang dikemukakan oleh seorang Usin bin Jatin yang mana ini merupakan pelanggaran MOU tersebut tetapi hak untuk menuntut pengembalian untuk pengayaan yang tidak adil masih belum terakru kerana MOU tersebut belum ditamatkan. Malah pada 27 November 2006, apabila defendan pertama menyatakan bahawa dia tidak mengiktiraf MOU tersebut sebagai mengikat, MOU tersebut masih sah dan berterusan, oleh itu, masih tiada hak untuk menuntut pengembalian terakru. Oleh itu, tindakan plaintif yang difailkan pada 26 November 2012, telah difailkan dalam tempoh enam tahun yang diperuntukkan oleh perkara 97 Jadual kepada Ordinan Had Masa Sabah dan tidak terhalang oleh had masa (lihat perenggan 55–57, 60, 66 & 69).]

Cases referred to

Dream Property Sdn Bhd v Atlas Housing Sdn Bhd [2015] 2 MLJ 441, FC (refd)
Goh Yew Chew & Anor v Soh Kian Tee [1970] 1 MLJ 138, FC (refd)
Hira Lal And Sons And Anr v Aspirants Mills Majitha Road AIR 1956 P H 13, HC (refd)

Legislation referred to

Contracts Act 1950 ss 40, 65, 66
Limitation Act 1908 [IN]
Limitation Ordinance (Cap 72) s 23, Schedule, items 93, 95, 97

Appeal from: Suit No BKI-22–274–11 of 2012 (High Court, Kota Kinabalu)

Chung Jiun Dau (Chung & Assoc) for the appellant.
Dayangku Afiqah Alya Engku Johari (Mohd Zulfadhli bin Darman Shah with her) (Ngui & Assoc) for the respondent.

Mohd Sofian JCA:

INTRODUCTION

[1] This is the appellant/plaintiff's appeal against the decision of the High Court in dismissing the appellant/plaintiff's claim against the second defendant with no order as to costs.

[2] For ease of reference, parties shall be referred to as they were in the proceedings before the High Court namely the appellant as plaintiff and the respondent as the defendant.

[3] Having considered the appeal records and the submissions of the parties in the appeal, it is our unanimous decision that the appeal is allowed with no order as to costs. We now give our reasons for the same.

BACKGROUND FACTS

[4] The plaintiff and the first defendant are father and son. They worked together and ran what is known today as the Konkasaki Group. The first defendant worked as the office manager and was appointed directors in several companies in the Konkasaki Group. The second defendant was also given shares in the companies in the Konkasaki Group.

[5] Due to some misunderstanding they both agreed to amicably part ways. It all started in early 2005 when the first defendant allegedly assaulted the

plaintiff over a heated argument with his wife (the mother of the first defendant). It would appear that the heated argument was due to the plaintiff's infidelity.

[6] The plaintiff had wanted the first defendant to resign as directors in all companies in Konkasaki Group and to return all the first defendant's shares in Konkasaki Group to the plaintiff.

[7] The plaintiff was not only angry with the first defendant, but he appeared to no longer want to have to do anything with him. It would appear that he needed to renounce the first defendant as his son.

[8] The plaintiff had called his brother, Paul Kong Pak Nam (Mr Paul) to help out. There were discussions with Paul on how best for them to part ways. The discussions being successful, Paul had then prepared a memorandum of understanding ('MOU') setting out the terms of their parting which was then signed by both the plaintiff and the first defendant. The MOU was dated the 14 May 2005.

[9] Subsequent to that, the plaintiff discovered that the first defendant had breached the MOU and had caused AKL Construction Sdn Bhd (previously known as Pembangunan Daspel Sdn Bhd) to enter into various sale and purchase agreements ('SPA') dated on or about 18 April 2006 with one Usin bin Jatin in respect of Lots 3–7, 18–20, 30–36 at Kolombong Light Industrial Centre (14 units), which had already been agreed to be transferred to Mohamad Sari bin Datuk Hj Nuar and Sandralilah bt Mohd Said or their respective nominees.

[10] The plaintiff therefore alleged that the first defendant had repudiated his obligations under the MOU and acted as he was no longer bound by its terms. Hence, this plaintiff's suit against the first and second defendant.

[11] The plaintiff, in para 17 of the statement of claim prayed as in the following:

> 17. As a result of the first Defendant's actions, the Plaintiff has suffered losses and damage.
>
> Wherefore, the Plaintiff claims against the first and second Defendants:
>
> (a) a declaration that the first Defendant has repudiated his obligation under the MOU dated 14.5.2005 between the Plaintiff and the first Defendant;
>
> (b) an order that the first Defendant cause all the shares in AKL Construction Sdn Bhd to be re-transferred to the Plaintiff and/or his nominees within 7 days;

(c) an order the second Defendant transfer all the shares in AKL Construction Sdn Bhd and Sabalight Sdn Bhd to be re-transferred to the Plaintiff and/or his nominees within 7 days;

(d) further or in the alternative, that the Registrar of the High Court execute share transfer form for the transfer of all the shares in AKL Construction Sdn Bhd and Sabalight Sdn Bhd to be re-transferred to the Plaintiff and/or his nominees;

(e) further on in the alternative, damages to be assessed;

(f) interest on damages, as may be ordered by this Honourable Court, at the rate of 5% or at such rate, as may be ordered by this Honourable Court, from the date hereof until the date of full payment;

(g) costs; and

(h) such other relief as this Honourable Court deems fit or proper.

[12] The first defendant had filed a counterclaim seeking the following:

(a) a declaration that the said un-concluded MOU is invalid and unenforceable having been procured by the plaintiff's father in consequence of his coercive and abusive conduct towards his wife, the first defendant and the first defendant wife. The said un-concluded MOU was signed by the first defendant to temporarily pacify the plaintiff's violent conduct towards the family members and the anticipated settlement could not be achieved as the plaintiff continued to be adamant in his unlawful ways;

(b) an account to be taken to determine the true and accurate rights entitlements and shares of the plaintiff and the first defendant under the Konkaski group of companies consisting of KK Land Sdn Bhd, Sabalight Sdn Bhd, Pembangunan Daspel Sdn Bhd, Mortarmix Sdn Bhd, Aggasf Properties Sdn Bhd, Borneo Utama Sdn Bhd, Tinagat Properties Sdn Bhd, Classic Strike Sdn Bhd, Konkajaya Sdn Bhd, Konkajadi Sdn Bhd, Konka Jadi Corporation Sdn Bhd, Konkasaki Holding Sdn Bhd, Konkasaki Homes Sdn Bhd, Everlasting Luck Sdn Sdn Bhd, Huba Sdn Bhd, Konkamaju Sdn Bhd, KK Best Properties Sdn Bhd, Tinagat Properties Sdn Bhd, Tinagat Construction Sdn Bhd, and all the necessary consequential orders and directions for settlement of the account whether by payment or re-transfer of shares, as the case may be, inclusive of damages, as may be appropriate upon the taking of the account;

(c) interests and costs; and

(d) further or other reliefs as the court may deem fit.

[13] At the time of this proceeding, the first defendant is an undischarged bankrupt but has obtained sanction of the Director General of Insolvency to engage the legal firm. However, the legal firm was discharged as solicitors for the first defendant and the second defendant in 2017. The first defendant did not engage another firm of solicitors to represent him nor did he seek sanction of the Director General of Insolvency to appoint another firm of solicitors.

[14] At the start of the trial, learned counsel for the second defendant informed the court that the first defendant being a bankrupt, had elected not to defend himself and that the trial was only between the plaintiff and second defendant.

THE PLAINTIFF'S CASE

[15] The plaintiff in their submission had argued the followings:

(a) Suit 274 and the Originating Summons No K 24–03 of 2007 ('OS') may arise out of similar background facts but the causes of action and the parties are different'. The plaintiff submitted that there is no duplicity of proceedings as it is essentially an issue of law which the court had already decided when the court disallowed the striking out application;

(b) the plaintiff also submitted that the issues of abuse of process and multiplicity of proceedings are res judicata since these issues had been dismissed in the striking out application;

(c) an allegation of time barred was previously raised by the defendants in the striking out application which had been dismissed. It is therefore the view of the plaintiff that since there was no appeal filed overturning that decision, this allegation of time bar is res judicata;

(d) the plaintiff is not suing the second defendant on the basis of contract since the second defendant is not party to the MOU, rather the plaintiff's claim is a restitution for unjust enrichment. The plaintiff contended that there is no specific limitation period provided in the Sabah Limitation Ordinance ('the SLO') for a claim based on unjust enrichment or restitution hence item 97 of the Schedule to the SLO is applicable. According to the plaintiff, the right to sue accrues when the plaintiff accepted the first defendant's repudiation of the MOU when he wrote the letter dated 27 November 2006 in which he stated for the first time that the MOU was 'not recognised'. The plaintiff therefore within six years period commencing from the letter dated 27 November 2006 (the repudiatory act); and

(e) essentially there can be no dispute that the second defendant was enriched by the shares in Sabalight Sdn Bhd and the shares in AKL

Construction Sdn Bhd at the expense of the plaintiff. The second defendant was nominated by the first defendant to receive or to hold the shares in Sabalight Sdn Bhd and AKL Construction Sdn Bhd.

THE SECOND DEFENDANT'S CASE

[16] The second defendant submitted as follows:

(a) that at the commencement of the trial learned counsel for the second defendant had informed the court that the statement of defence is a joint defence for the first and second defendants;

(b) it was pleaded that all the plaintiff's claims are unmeritorious, dishonestly made and was filed with ulterior motive by seeking transfer of shares in Sabalight Sdn Bhd and AKL Construction Sdn Bhd to him;

(c) that the subject matter in this suit is identical to or substantially the same with the subject matter of the Originating Summons No K 24–03 of 2007 ('OS') and that in commencing this present suit, five years after the OS action filed in 2007, there was duplicity of proceedings and hence an abuse of the process of the court by the plaintiff. In the OS filed on the 8 January 2007 (OS), KK Land Sdn Bhd (the first plaintiff), Koi Hoi Chieng (the second plaintiff), Mohd Sari bin Datuk Hj Annuar (the third plaintiff) and Sandralilah bt Mohd Said (the fourth plaintiff in the OS) (collectively referred as 'the plaintiffs in the OS') sued AKL Construction Sdn Bhd (the first defendant in the OS), Kong Yu Yong (the second defendant in the OS) and Usin bin Jatin (the third defendant in the OS) (collectively referred to as 'the defendants in the OS'). The chronology of events involving the OS provided by the defendants are as follows:

No	Dates	Events
1.	8 January 2007	OS action between the plaintiff (together with the second, third and fouth plaintiffs in the OS action) commenced.
2.	23 May 2007	Judgment was entered in favour of the plaintiff by YA Datuk Nurchaya bt Hj Arshad but stayed its execution pending the hearing of the defendant's application for extension of time to file affidavit in opposition.
3.	28 June 2007	The first to third defendants in the OS applied to set aside the judgment dated 23 May 2007.
4.	31 March 2009	The first to third defendants' application to set aside the judgment dated 23 May 2007 was allowed by YA Yew Jen Kie and extension of time was allowed for the filing of affidavit in opposition

5.		The first, second and fouth plaintiffs filed notice of appeal to the Court of Appeal against High Court order dated 31 March 2009 in setting aside the order dated 23 May 2007.
6.	30 April 2009	The third plaintiff filed notice of appeal to the Court of Appeal against the order dated 31 March 2007 in setting aside the order dated 23 May 2007.
7.	By end of 2009	The third and fouth plaintiffs (or their nominees) had taken physical possession of the 14 units of light industrial building.
8.	14 November 2011	The third plaintiff's appeal was allowed by the Court of Appeal.
9.	9 January 2012	The first, second and fouth plaintiffs appeal was dismissed by the Court of Appeal.
10.	25 June 2012	Federal Court granted the first and second defendants leave to appeal to the Federal Court against the decision of the third plaintiff's appeal.
11.	28 June 2012	The first and second defendants filed notice of appeal to Federal Court.
12.	26 November 2012	The plaintiff commenced this present action against the first and second defendants.
13.	16 June 2017	The defendant's then solicitors, Messrs Ting Anuar & Co filed a notice of motion for a declaration that the firm be discharged from acting for the defendants.
14.	2 August 2017	Federal Court allowed Messrs Ting Anuar & Co's application to discharge as solicitors and struck out the defendants' appeal.

(d) on the issue of res judicata raised by the plaintiff, the second defendant submitted that the dismissed striking out application was decided based solely on uncontroverted affidavit evidence by the parties and that the affidavit evidence was not subjected to cross examination. It is trite law that for a judicial decision to operate as res judicata it must be final in the sense that it leaves nothing to be judicially determined or ascertained;

(e) that the mere fact that there was no appeal against the dismissal of the striking out application does not necessarily mean that the issue of abuse of process of court and multiplicity of proceedings are now res judicata.

(f) on the issue of time barred, it is submitted that the relevant item is 93 and item 95 of the SLO. The second defendant contended that the first defendant had purportedly repudiated his obligations under the MOU on or about April 2006 by causing AKL Construction Sdn Bhd to sell the 14 units of light industrial buildings to Usin bin Jatin and not when the first defendant wrote the letter dated 27 November 2006 denying his

obligations under the MOU 'for the first time'. The second defendant submitted that before or by the 13 October 2006 was the actual date when the plaintiff had already known of the first defendant's repudiation because on 13 October 2006, the plaintiff had instructed his solicitors, Messrs Chung & Assoc to write to Messrs Ronny Cham, the then solicitors for AKL Construction Sdn Bhd, to demand for the removal of caveats registered on the said land;

(g) the second defendant averred that the plaintiff's cause of action of restitution for unjust enrichment against the second defendant was not pleaded and is an afterthought as such the plaintiff's action against the second defendant ought to be dismissed. A perusal of the plaintiff's statement of claim shows that the second defendant was mentioned only in para 16 and in prayer (c) of the plaintiff's statement of claim. Paragraph 16 merely pleaded that 'The second defendant is the company utilised by the first defendant to hold shares in AKL Construction Sdn Bhd and Sabalight Sdn Bhd and the first defendant is a director in the second defendant. The second defendant is under the control of and day to day management of the first defendant'. But it is not pleaded in para 16 such as the cause of action against the second defendant is for unjust enrichment; and

(h) the second defendant although not a party to the MOU, received the shares of AKL Construction Sdn Bhd and Sabalight Sdn Bhd from the first defendant in a separate transaction taking place outside the scope of the MOU as the first defendant's nominee. It is therefore the second defendant's submission that it could not be held liable to make restitution to the plaintiff pursuant to s 66 of the Contracts Act 1950.

DECISION OF THE HIGH COURT

[17] On 27 December 2019, at the conclusion of the trial, the learned High Court judge ('HCJ') found that the plaintiff had not on balance probabilities proven his claim against the second defendant on restitution for unjust enrichment.

[18] The learned HCJ was of the view that:

(a) the plaintiff had all the information and documents to sufficiently prepare for the OS to include the termination of the MOU. This suit is an abuse of process and should be dismissed as there is duplicity of proceeding;

(b) res judicata does not apply in the circumstances since limitation is fact centric which can only be determined during trial;

(c) in the SLO, it would appear there is no specific item that deal with cause of action of restitution for unjust enrichment. The applicable item is 97 of the SLO which is six years from when the right to sue accrues. On the facts time starts from either April 2006 or 13 October 2006, the plaintiff's claim against the second defendant is statute barred;

(d) the issue on whether the plaintiff is entitled to restitution by reason of unjust enrichment, it is only relevant if the court was wrong in its finding on the duplicity of proceedings and limitation issues;

(e) it is trite law that the court should not decide on an issue not pleaded by the parties. Having read the statement of claim, the court agreed with the second defendant that the plaintiff's cause of action on restitution for unjust enrichment had not been pleaded. It is only in the submission (encl 176) that for the first time the plaintiff submitted that his claim against the second defendant is not based on contract but on unjust enrichment and restitution because the second defendant is not a party to the MOU. The second defendant likewise did not address this 'unjust enrichment and restitution' in his main submission dated 20 July 2018, since this was not part of the plaintiff's pleaded case; and

(f) the plaintiff had not addressed the position of s 66 of the Contracts Act 1950 vis a vis the case of *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] 2 MLJ 441; whether there was an overlap or are they mutually exclusive or whether the plaintiff had to opt for either one when pursuing a case against a party not privy to a contract. All these had not been pleaded by the plaintiff. The plaintiff had not referred to s 66 or at all in his submissions, although on restitution for unjust enrichment, the plaintiff had only referred to *Dream Property*. There are also valid matters for consideration, such as the position of the first defendant as a bankrupt, is he still a director of the second defendant, could he sign away his shares without having to account to the DGI who had taken over his affairs.

But sadly, all these are matters ought to be pleaded so that they can be addressed by all parties and considered by the court. The court cannot decide on un-pleaded issue.

[19] Dissatisfied with the decision, the plaintiff filed this appeal against the second defendant.

THE APPEAL

[20] This appeal is premised on the following grounds as stated in the memorandum of appeal namely:

(a) the learned HCJ erred in law and in fact in dismissing the plaintiff's claim against the second defendant;

(b) the learned HCJ erred in law and in fact in failing to consider that the plaintiff's claim against the second defendant is based on largely undisputed fact and that the only issue was whether the second defendant had a defence against the plaintiff's claim; and

(c) the learned HCJ erred in law and in fact in failing to consider that the second defendant had no defence to the plaintiff's claim.

[21] Further grounds stated in the supplementary memorandum of appeal are:

(a) the learned HCJ erred in law and in fact in giving grounds of decision which are inconsistent with the short ruling given on 10 May 2019;

(b) the learned HCJ erred in failing to consider the short ruling given on 10 May 2019 had stated that the plaintiff had proven its case against the first defendant;

(c) the learned HCJ erred in finding that the first defendant had a plausible defence to the plaintiff's claim against him;

(d) the learned HCJ erred in finding that the evidence showed that the plaintiff had not made an election to terminate the MOU and failed to consider that the filing of the action against the first defendant would be a termination;

(e) the learned HCJ erred in failing to consider that the plaintiff's cause of action against the first defendant is different to the cause of action against the second defendant;

(f) the learned HCJ erred in finding that there is duplicity of proceedings with Originating Summons No K 24–03 of 2007 ('OS');

(g) the learned HCJ erred in failing to consider that the subject matter of OS was for removal of caveats lodged by Usin bin Jatin;

(h) the learned HCJ erred in failing to consider that the parties in OS are different to the parties in the present suit and that the second defendant is not a party to OS;

(i) the learned HCJ erred in finding that the plaintiff could have include his claims against the first defendant and the second defendant in the OS;

(j) the learned HCJ erred in failing to consider that the other plaintiffs in the OS are not party to the MOU in question and therefore the plaintiff's claim against the first defendant and second defendant could not have been included in the OS;

(k) the learned HCJ erred in finding that the plaintiff's filing of the present suit was an abuse of process;

(l) the learned HCJ erred in failing to consider that the respondent did not adduce any evidence at trial which was not available to the court during the hearing of the striking out application as regards the allegation of duplicity or abuse of process;

(m) the learned HCJ erred in failing to consider that the issues of multiplicity of proceedings and abuse of process are res judicata;

(n) the learned HCJ erred in finding that the plaintiff's claim against the second defendant is statute barred;

(o) the learned HCJ erred in finding that the plaintiff did not plead the cause of action of unjust enrichment or restitution against the second defendant;

(p) the learned HCJ erred in failing to consider that only material facts need to be pleaded and not issues of law;

(q) the learned HCJ erred in failing to consider that there is no issue of surprise to the second defendant;

(r) the learned HCJ erred in failing to consider that the second defendant is not a party to the MOU and hence ss 65 and 66 of the Contracts Act 1950 are not relevant to the second defendant;

(s) the learned HCJ erred in failing to consider that unjust enrichment and restitution can be claimed outside of the Contracts Act 1950;

(t) the learned HCJ erred in failing to consider that the second defendant had been unjustly enriched and ought to make restitution to the appellant;

(u) the learned HCJ erred in failing to consider that the second defendant has not established any defences to the claim for unjust enrichment and/or restitution; and

(v) the learned HCJ erred in failing to consider that the second defendant is not entitled to raise defences on behalf of the first defendant which are not relevant to the cause of action against the second defendant.

SUBMISSIONS

[22] Before us, the learned counsel for both the plaintiff and the second defendant canvassed the same argument as before the High Court.

[23] In addition, the learned counsel for the plaintiff submitted that the grounds of decision dated 29 July 2020 given by the learned HCJ is inconsistent with short ruling delivered on 10 May 2019 as follows:

(a) the learned HCJ merely held that the plaintiff had not proven his claim against the second defendant. The issues of duplicity of proceedings or abuse of process of the court was not stated in the short ruling. Duplicity or abuse of process is entirely different from holding that the plaintiff did not prove his claim;

(b) the learned HCJ also did not hold that the plaintiff's claim against the second defendant was statute barred. This issue is also different to the finding that the plaintiff's claim was not proven; and

(c) similarly, the finding in the grounds of decision that the plaintiff did not plead for restitution based on unjust enrichment against the second defendant was not stated in the short ruling. This is a pleading point and is entirely different to not proving the appellant's claim.

[24] The second defendant had submitted that the subject matter in this present suit is identical to or substantially the same with the subject matter in the OS as agreed by the learned HCJ in his grounds of judgement. It was submitted that the plaintiff could have included the claim against the second defendant in the OS action.

[25] Nevertheless, on this alleged duplicity of proceedings amounting to abuse of process, the learned counsel for the plaintiff submitted that the learned HCJ had misconstrued what is duplicity of proceedings which would amount to an abuse of the process of the court. In the instant case, the second defendant is not even a party to the OS. This means that the plaintiff could not have made any claim against the second defendant in the OS.

[26] It was further submitted by the plaintiff's counsel that the subject matter of the OS is also not the same as in the plaintiff's claim against the second defendant in the instant case. The OS was concerned with the caveats lodged by one Usin bin Jatin, who is not a party to the proceedings in the instant case, over the properties which were meant to be transferred to Mohamad Sari bin Datuk Hj Nuar and Sandralilah bt Mohd Said or their nominated parties. During the trial itself, DW1 (the first defendant) himself had admitted that even before the MOU was entered into, there were already binding commitments to transfer the properties to Mohamad Sari bin Datuk Hj Nuar and Sandralilah bt Mohd Said. DW1 went onto confirm the agreements that contained the binding commitments to transfer the properties to Mohamad Sari bin Datuk Hj Nuar and Sandralilah bt Mohd Said, and which he admitted to personally signing.

[27] According to the plaintiff, no relief was sought in respect of the MOU in the OS. This is no surprise because the three of the four plaintiffs in the OS were not parties to the MOU and hence are not concerned with the enforcement of the obligations under the MOU or any damages or relief flowing from breach of the MOU. Hence it is not possible for the plaintiff's claim against the second defendant to have been included in the OS. Not only is the respondent not a party to the OS, three out of four of the plaintiffs in the OS were not concerned about the shares of AKL Construction Sdn Bhd or Sabalight Sdn Bhd which the plaintiff is trying to recover from the second defendant. Further the relief sought by the plaintiff against the second respondent is completely different to the relief sought by the plaintiffs in the OS.

[28] On the issue of whether the plaintiff pleaded for restitution based on unjust enrichment, it was submitted by the plaintiff's counsel that the learned HCJ has misconceived the nature of the plaintiff's cause of action against the second defendant and has certainly erroneously assume that the cause of action is based on contract or even the Contracts Act 1950.

[29] However, according to the second defendant, no other material particulars to identify the cause of action in unjust enrichment was pleaded.

[30] This had been denied by the plaintiff. The plaintiff submitted that the plaintiff's cause of action against the second defendant is based on unjust enrichment and the relief claimed is for restitution of the shares in AKL Construction Sdn Bhd and Sabalight Sdn Bhd that has been placed in the name of the second defendant by the first defendant.

[31] According to the plaintiff, it had been pleaded that the plaintiff started various property development businesses under the Konkasaki group of companies. Subsequently, the plaintiff and the first defendant had entered into the MOU. Under the terms of the MOU, the plaintiff was to resign as director of AKL Construction Sdn Bhd and Sabalight Sdn Bhd and transfer the shares in the two companies to the first defendant or his nominee for a nominal amount of RM1. Pursuant to the MOU, the plaintiff had resigned as director of AKL Construction Sdn Bhd and Sabalight Sdn Bhd and had caused the transfer of his shares in the two companies to be transferred to the first defendant's nominee. It was unknown to the plaintiff that the first defendant had caused AKL Construction Sdn Bhd to enter into various sale and purchase agreements with Usin bin Jatin for the properties which were meant to be transferred to Mohamad Sari bin Datuk Hj Nuar and Sandralilah bt Mohd Said or their nominated parties and these sale and purchase agreements were utilised by Usin bin Jatin to lodge caveats.

[32] Consequent to that, the first defendant had subsequently issued a letter dated 27 November 2006 under the letterhead of AKL Construction Sdn Bhd whereby he acted as if he was no longer bound by the terms of the MOU. The plaintiff pleaded that as a 'result of the first defendant's repudiation, there had been a total failure of consideration for the transfer of the shares in AKL Construction Sdn Bhd and Sabalight Sdn Bhd to the first defendant and/or his nominees'.

[33] In the statement of claim, the plaintiff prayed for the second defendant to transfer the shares in AKL Construction Sdn Bhd and Sabalight Sdn Bhd back to the plaintiff or his nominees whereby the plaintiff had pleaded that the second defendant is the company utilised by the first defendant to hold the shares in AKL Construction Sdn Bhd and Sabalight Sdn Bhd and the first defendant is a director in the second defendant which is under the control of and day to day management of the second defendant.

[34] According to the plaintiff, it is trite that one only needs to plead the material facts and not the law or the evidence. It is submitted that the plaintiff's pleadings are sufficient for claiming unjust enrichment against the second defendant in respect of the shares in AKL Construction Sdn Bhd and Sabalight Sdn Bhd. It is clear that the plaintiff had pleaded that the he had not received consideration for the shares (total failure of consideration) as a result of the first defendant's repudiation of the MOU and that the shares were being held by the second defendant. In fact, the second defendant did make a bare denial that the shares were transferred by the plaintiff to and held by the second defendant.

[35] Since the shares were transferred to the second defendant pursuant to the MOU and there was a total failure of consideration for the shares due to the first defendant's repudiation of the MOU, therefore the second defendant had been enriched with the shares in AKL Construction Sdn Bhd and Sabalight Sdn Bhd (which it did not pay for) and the retention of the shares in AKL Construction Sdn Bhd and Sabalight Sdn Bhd by the second defendant is therefore unjust.

[36] The plaintiff submitted that second defendant did not plead any defence in respect of the plaintiff's claim for restitution based on unjust enrichment. The second defendant had misconceived in its understanding of the equitable defence of change of position. The defence of change of position is not a mere case of change of circumstances. The defence of change of position relates to the change of position of an innocent party in relation to the benefit received. In the present case, there has been no change of position by the second defendant in respect of the shares of Sabalight Sdn Bhd and AKL Construction

Sdn Bhd. Further, it is also clear that the conduct of the second defendant is not bona fide or innocent. The second defendant can in no way be described as an innocent party.

[37] On the issue of time bar, the second defendant submitted that the plaintiff's right to sue accrued on 13 October 2006 or on earlier date as found by the learned HCJ because the plaintiff had knowledge about the breach at least by 13 October 2006 when the plaintiff's solicitor wrote a letter demanding for a removal of the caveats lodged by Usin bin Jatin. As such, the period of limitation shall run six years from 13 October 2006 pursuant to item 97 of the SLA.

[38] On the other hand, it was submitted by the counsel of the plaintiff that a right to claim a restitution remedy founded on the law of unjust enrichment is not founded on contract law or a breach of contract but may be available where a contract has been validly terminated. In other words, a breach of a contract does not on its own give rise to a right to claim restitution remedy. The right to claim restitution based on unjust enrichment does not accrue even at the point in time when a contracting party has repudiated a contract. Accordingly, the learned HCJ had erred in finding that the appellant's claim against the respondent was statute barred.

OUR DECISION

[39] There are three main grounds by the learned HCJ in dismissing the plaintiff's claim against the second defendant namely:

(a) that the plaintiff's action constitute duplicity of proceedings and/or tantamount to an abuse of process of court;

(b) that the plaintiff had not pleaded a claim for restitution by reason of unjust enrichment in the statement of claim against the second defendant; and

(c) that the plaintiff's claim against the second defendant is statute barred.

[40] The court will discuss the three broad reasons by the learned HCJ for the dismissal of the plaintiff's claim against the second defendant *in seriatim.*

Alleged duplicity of proceedings since the subject matter in Suit 274 is identical or substantially the same as that of the OS No K 24–03 of 2007 ('OS') and/or tantamount to an abuse of process of court

We agreed with learned counsel for the plaintiff that Suit 274 and the Originating Summons No K 24–03 of 2007 ('OS') may arise out of similar background facts but the causes of action and the parties are different. The

pleaded case of the plaintiff against the second defendant in Suit 274 that 'The second defendant is the company utilised by the first defendant to hold shares in AKL Construction Sdn Bhd and Sabalight Sdn Bhd and the first defendant is a director in the second defendant is under the control of and day to day management of the first defendant'.

In the OS, the plaintiffs sued AKL Construction Sdn Bhd (the first defendant in the OS), Kong Yu Yong (the second defendant in the OS) and Usin bin Jatin (the third defendant in the OS) where the prayers sought are:

(a) a declaration that the third defendant has no interest and/or no caveatable interst in Lots 3, 4, 5, 6, 7, 19, 20, 30, 31, 32, 33, 34 and 35, Kolombong Light Industrial Centre;

(b) a declaration that the third plaintiff is the lawful and beneficial owner of Lots 3, 4, 5, 6, and 7 of Kolombong Light Industrial Centre;

(c) a declaration that DHN (KK) SDN Bhd is a lawful and beneficial owner of Lots 30, 31 and 32 of Kolombong Light Industrial Centre;

(d) a declaration that Caremost Sdn Bhd is the lawful and beneficial owner of Lots 33, 34 and 35 of Kolombong Light Industrial Centre;

(e) a declaration that Global FMCGj is the lawful and beneficial owner of Lot 19 of Kolombong Light Industrial Centre;

(f) a declaration that Dennis Wee Chung is the lawful and benecial owner of Lots 18 and 20 of Kolombong Light Industrial Centre;

(g) that the defendants cause to be removed or withdrawn the caveats registered against CL 015023597, under Memorial Nos 10460473, 10460474, 10460475, 10460476, 10460477, 10460478, 10460479, 10460480, 10460481, 10460482, 10460483, 10460484, 10460485 and 10462194 and any caveats registered against CL 01523597 in respect of Lots 3, 4, 5, 6, 7, 19, 20, 30, 31, 32, 33, 34 and 35, Kolombong Industrial Centre;

(h) that the defendants be restrained whether by themselves, their servants or agent or other encumbrances on CL 01523597 in respect of Lots 3, 4, 5, 6, 7, 19, 20, 30, 31, 32, 33, 34 and 35 Kolombong Light Industrial Centre and from hindering or obstructing the sale and purchase of, any dealings in respect of Lots 3, 4, 5, 6, 7, 19, 20, 30, 31, 32, 33, 34 and 35, Kolombong Light Industrial Centre and from hindering or obstructing the sale and purchase of, transfer or any dealings in respect of Lots 3, 4, 5, 6, 7, 19, 20, 30, 31, 32, 33, 34 and 35, Kolombong Light Industrial Centre;

(i) that the defendants hand over or cause to be handed over all keys and electric operators for the roller shutters for Lots 3, 4, 5, 6, 7, 19, 20, 30, 31, 32, 33, 34 and 35 Kolombong Light Industrial Centre;

(j) damages for wrongful lodgement and registration of caveats to be assessed;

(k) costs; and

(l) such further or other relief as the court thinks fit.

[41] We are of the considered view that whether or not the subject matters of the OS and Suit 274 are identical to or substantially the same is a question of fact which can be determined by the court. Having perused the cause papers in the OS and in Suit 274 we find that the second defendant is not a party to the OS which means that the plaintiff could not have any claim against the second defendant in the OS. The subject matter of the OS is also not the same at the plaintiff's claim against the second defendant in the instant case. If one were to look at the OS it concerned with the caveat lodged by one Usin bin Jatin who is not a party to the proceedings in the present case relating to the properties which were meant to be transferred to Mohamad Sari bin Datuk Hj Nuar and Sandralilah bt Mohd Said or their nominated parties.

[42] In the statement of claim, the plaintiff prays for the first defendant to transfer the shares in second defendant and Sabalight Sdn Bhd back to the plaintiff or his nominees.

[43] No relief was sought in respect of the MOU in the OS. This is because three of the four plaintiffs in the OS were not parties to the MOU and hence are not concerned with the enforcement of the obligations under MOU. Hence it is not possible for the plaintiff's claim against the defendant could have been included in the OS and three out four of the plaintiffs are not concerned about the shares of AKL Construction Sdn Bhd and Sabalight Sdn Bhd which the plaintiff is trying to recover from the defendant.

[44] On the facts before us, we are of the view that there is no duplicity of proceedings and also no abuse of the process of court. The learned HCJ was plainly wrong in concluding that the present action and the OS is considered as duplicity of proceedings and/or tantamount to an abuse of process of court.

The plaintiff had not pleaded a claim for restitution by reason of unjust enrichment in the statement of claim against the second defendant

[45] It is trite that one needs to plead the material facts and not the law or the evidence. Learned counsel for the plaintiff submitted that the pleadings are sufficient for claiming 'unjust enrichment' against the defendants in respect of

A the shares in the second defendant and Sabalight Sdn Bhd. The plaintiff had pleaded that the plaintiff had not received consideration for the shares as a result of the first defendant's repudiation of the MOU and that the shares were being held by the defendants.

B **[46]** During the trial, it was not disputed that the plaintiff had transferred the shares to the defendants pursuant to the MOU. The plaintiff had transferred 400,000 shares in the second defendant and 250,000 shares in Sabalight Sdn Bhd to the defendants.

C **[47]** We are also of the view that the defendants did not plead that it had paid for any of the shares in the second defendant. This was further borne out by the fact that the shares in the second defendant and Sabalight Sdn Bhd were transferred to the first defendant's nominee for a nominal sum of RM1 showed
D that no payment was made by the defendants.

[48] The defendants' own witness DW2 in evidence admitted that the first defendant could not afford to pay for the shares.

E **[49]** Since the shares were transferred to the defendants pursuant to the MOU and there was a total failure of consideration for the shares due to the first defendant's repudiation of the MOU, therefore the defendants had been enriched with the shares in the first defendant and Sabalight Sdn Bhd and the retention of the shares in the first defendant and Sabalight Sdn Bhd is therefore
F unjust.

[50] We note that in the ground of decision of the learned HCJ, it was stated that the plaintiff did not plead any cause of action for restitution for unjust enrichment against the defendants. However before coming to the finding that
G the plaintiff did not plead any cause of action for restitution for unjust enrichment against the defendants the HCJ had held that:

> [50] We are here dealing with a claim based on restitution for unjust enrichment due to the breach of the MOU by the first defendant.

H **[51]** We also note in *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* the defendant was claiming unjust enrichment against the plaintiff and the Federal Court held that:

> a cause of action in unjust enrichment can give rise to a right to restitution where it
I can be established that:
>
> (a) the plaintiff must have been enriched;
>
> (b) the enrichment must be gained at the defendant's expense;
>
> (c) that the retention of the benefit by the plaintiff was unjust and;

(d) there must be no defence available to extinguish or reduce the plaintiff's liability to make restitution.

[52] The Federal Court also recognised that the law of unjust enrichment can apply to rights of parties to a contract which has been validly terminated. It further held that the 'foundation of the right to restitution remedy as it is understood today is that it is founded on the law of unjust enrichment which fell outside the domains of contract and tort. The law of contract/tort and the law of unjust enrichment are conceptually distinct.

[53] We are of the considered view that the pleadings are sufficient for claiming 'unjust enrichment' against the defendants in respect of the shares in the second defendant and Sabalight Sdn Bhd. The plaintiff had pleaded that the plaintiff had not received consideration for the shares as a result of the first defendant's repudiation of the MOU and that the shares were being held by the defendants.

The plaintiff's claim against the second defendant is statute barred.

[54] It was the contention of the plaintiff that the learned HCJ had held that the plaintiff's claim against the defendants is statute barred as provided in item 97 of the Sabah Limitation Ordinance which states that for Suit for which no period of limitation is prescribed in the Schedule, it is six years from the date the right to sue accrues. The learned HCJ held that the plaintiff's claim for restitution for unjust enrichment against the defendant accrued when there was a breach of the MOU by the first defendant.

[55] We agree that a claim for restitution based on unjust enrichment is not a contractual remedy and does not arise merely because there has been a breach of contract. In *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* the court held that 'the law of unjust enrichment in relation to 'the all rights of parties to a contract which has been validly terminated and the foundation of the right to restitution remedy as it is understood today is that it is founded on the law of unjust enrichment fall outside the domains of contract'.

[56] That being so, a right to claim a restitution remedy founded on the law of unjust enrichment is not founded on contract law or a breach of contract but may be available where a contract has been validly terminated. In other words, a breach of a contract does not on its own give rise to a right to claim restitution remedy.

[57] The right to claim restitution based on unjust enrichment does not accrue even at the point in time when a contracting party has repudiated a contract.

[58] Section 40 of the Contracts Act 1950 deals with repudiation and states as follows:

> Effect of refusal of party to perform promise wholly;
>
> When a party to a contract has refused to perform or disabled himself from performing, his promise in its entirety, the promise may put an end to the contract, unless he has signified , by words or conduct, his acquiescence in its continuance.

[59] To amount to a repudiation, there has to be a refusal to perform a contract in its entirety. However, it does not mean that the contract has ended. The promise must do something to put an end to the contract.

[60] In the instant case, the first defendant had repudiated the MOU when the first defendant wrote the letter dated 27 November, 2006 in which the first defendant states for the first time that the MOU was 'not recognised'. This amounted to a repudiation because it is a total disregard of his obligations under the MOU. In essence, it was a refusal by the first defendant to perform the MOU in its entirety. However it is important to note that even at this point in time, the plaintiff had yet to accept the first defendant's repudiation of the MOU. This means that the MOU is still on foot and no right to claim restitution had yet accrued.

[61] It is instructive to note that in *Goh Yew Chew & Anor v Soh Kian Tee* [1970] 1 MLJ 138 at 141 the Federal Court held that:

> But treated as a finding that there has been a total failure of consideration the conclusion of the learned trial judge that the respondent is entitled to the return of the money paid can be supported on the principle that the respondent's right to recover the money arises, not ex contractu, but by operation of law since the common law gives a remedy in quasi-contract to a party who has got what he bargained for. This principle or doctrine of failure of consideration was stated by Viscount Simon LC in *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1963] AC 32 in these words:
>
> > The claim of a party, who has paid money under a contract, to get the money back, on the ground that the consideration for which he paid it has totally failed, is not based on any provision contained in the contract, but arises because, in the circumstances that have happened, the law gives a remedy in quasi-contract to the party who has got that for which he bargained. It is a claim to recover money to which the defendant has no further right because in the circumstances that have happened the money must be regarded as received to the plaintiff's use ...

[62] Therefore, under the doctrines of repudiation of contract as well as total failure of consideration, the right to recover monies only accrues after the contract is put to an end.

[63] In the instant case the plaintiff had based its claim against the defendant upon the fact that the first defendant had by a letter dated 27 November, 2006 under the letterhead of the second defendant repudiated the MOU by stating amongst others that the MOU was never meant to be used for legal purpose. The plaintiff had pleaded that, as a result of the first defendant's repudiation, there had been a total failure of consideration for the transfer of the shares to the defendants.

[64] In *Hira Lal And Sons And Anr v Aspirants Mills Majitha Road* AIR 1956 P H 13, the court held that:

> (14) For these reasons I am of the opinion that assuming that the defendants insisted on performance of the contract in a way different from the terms of the contract the defendants repudiated it on 5.7.1948 and this repudiation was treated by the plaintiffs on 24.7.1948 as rescinding the contract. The result is that the plaintiffs on 24.7.1948 became entitled to damages for breach of contract and, therefore, the cause of action accrued to the plaintiff on that date ...

[65] *Hira Lal And Sons And Anr v Aspirants Mills Majitha Road* the repudiation had occurred on 5 July 1948 but the termination occurred on 24 July 1948. Hence the court held that the cause of action for contractual damages only accrued on the date of termination. Importantly, the court in *Hira Lal & Sons* had referred to the Indian Limitation Act 1908 which is in pari materia to the Sabah Limitation Ordinance.

[66] We are of the considered view that the plaintiff's cause of action against the defendants accrued when he knew about the caveats lodged by Usin bin Jatin which constitutes a breach of the MOU, the right to claim for restitution for unjust enrichment has not accrued yet as the MOU has not been terminated. Even as at 27 November 2006, when the first defendant stated that he does not recognise the MOU as binding, the MOU was still valid and subsisting. Hence the plaintiff's action which was filed on 26 November 2012, was filed within the six years period provided by item 97 of the Schedule to the Sabah Limitation Ordinance.

[67] Section 23 of the Sabah Limitation Ordinance makes abundantly that 'in the case of a continuing breach of contract, a fresh period of limitation begin to run at every moment of the time during which the breach or wrong, as the case may be, continues'.

[68] We are constrained to disagree with the learned HCJ as His Lordship failed to consider the fact that the first defendant's repudiation was continuing well beyond 27 November 2006 as even in the defence filed , the first defendant was still asserting that the 14 units of light industrial buildings had been sold to

Usin bin Jatin and could not be reversed. This was a continuing breach or repudiation of the MOU by the first defendant in total disregard of his obligations under the MOU.

[69] Hence, we find that the plaintiff's claim against the defendants was not statute barred.

[70] Based on the reasons as adumbrated above and in all the circumstances, it is our unanimous decision that there is merit in the appeal which required an appellate intervention. We are of the view that:

(a) the claim is not an abuse of court's process;

(b) the cause of action of the appellant was sufficiently pleaded in the statement of claim; and

(c) the claim is not statute barred.

[71] Therefore, in the circumstances, the appeal is allowed with no order as to costs. The order of the High Court dated 10 May 2019 in dismissing the claim against the second defendant (the respondent) is hereby set aside.

[72] On the issue that there is an error on the sealed order of the High Court, the appellant's counsel undertakes to regularise the order of the High Court dated 10 May 2019 within 14 days hereof.

Appeal allowed with no order as to costs; order of High Court set aside.

Reported by Dzulqarnain bin Ab Fatar